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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 61

TURNER DAIRY COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of the District Court (R. 23-26) are not reported. The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 39-45, 47-48) is reported at 166 F. (2d) 1.

JURISDICTION

The judgment of the court below was entered on February 18, 1948 (R.46). Both the petitioner and the respondent filed a petition for a rehearing. The court denied the petitions, modified its opinion, and entered an amended judgment on March 15, 1948

(R. 47-48). The petition for a writ of certiorari was filed on May 25, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C. 347).

QUESTIONS PRESENTED

(1) Whether, in an enforcement proceeding commenced by the United States to compel compliance with the provisions of a milk marketing order issued pursuant to the Agricultural Marketing Agreement Act of 1937, as amended, a milk handler may question the validity of the order on the ground that it omits a finding required to be included by that Act.

(2) Whether the inclusion in a Federal milk order of a finding with respect to the parity price of milk is essential to the validity of the order under the terms of the Agricultural Marketing Agreement Act of 1937, as amended.

STATUTE AND ORDER INVOLVED

The statute involved is the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U.S.C. 601, *et seq.*) which re-enacted, with amendments, the marketing provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31), as amended. The pertinent provisions of the Act are set forth in the Appendix.

The order involved is Federal Order No. 41, as amended, regulating the handling of milk in the

Chicago, Illinois, marketing area (4 F.R. 3764, 5 F.R. 2337, 6 F.R. 3130, 4552, 8 F.R. 1258, 5358, 8294, 9 F.R. 3063). The order is not printed in the record, but its pertinent provisions are quoted or summarized in this brief.

STATEMENT

The petitioner is a milk handler subject to Federal Order No. 41.[1] The order classifies milk into four classes according to its use, and establishes a use value for the milk in each class. The use value applied to Class I, or fluid milk, is the highest; the use values applied to Class II, III, or IV milk (milk the component parts of which are used to make cream, ice cream, condensed milk, butter, cheese, or other milk products) are progressively lower. Each handler of milk is required to report to the Market Administrator appointed to administer the order the quantity of milk received and the quantity of milk used in each class during the preceding monthly delivery period. Upon the basis of these reports, the total use value of the milk received by all handlers from all producers is determined. After making adjustments to reflect variations in butterfat or other factors with respect to which differentials are authorized, the total use value is divided by the total quantity of priced milk. The result is a uniform minimum price that all handlers must pay their producers, regardless of

[1] The Act and the Order involved in this case were before this court in *United States* v. *Ruzicka*, 329 U. S. 287, and *United States* v. *Wrightwood Dairy Company*, 315 U. S. 110.

the use that may have been made of the milk of a particular producer. The variance among handlers in the percentage of milk used in a given class will normally mean that the total use value of the milk purchased by a handler will be either greater or less than the total payments at the uniform minimum price that the handler is required to make to his producers. Any handler for whom there is a plus difference is required to pay the difference into a producer-settlement fund, which is an equalization pool, while any handler for whom there is a minus difference is entitled to withdraw the difference from the fund. In this manner all handlers can pay their producers the uniform minimum prices, regardless of the use they make of the milk of a particular producer.

This action was initiated by the filing of a complaint under Section 8a(6) of the Act to compel the petitioner (1) to make reports, (2) to submit its records for audit, and (3) to make payments to the producer-settlement fund, the administrative expense fund, and the marketing service fund, as required by the order (R. 2-5). The petitioner filed an answer setting up numerous defenses, but the petitioner did not deny that it had failed to comply with the provisions of the order (R. 12-16). After hearing on the respondent's motion for summary judgment (R. 40), the district court found that the petitioner had failed to file the reports required by the order, that the amount owed by the petitioner to the Market Administrator for the producer-

settlement fund, for marketing services, and for administrative expenses, cannot be determined until such reports are filed and verified by an audit of the petitioner's records, and that the order was issued in full compliance with the provisions of the Agricultural Marketing Agreement Act of 1937 (R. 23-25). The court thereupon issued a judgment mandatorily enjoining the petitioner to file with the Market Administrator the reports required by Federal Order No. 41, and to pay to the Market Administrator such sums as the reports and audit of the petitioner's books disclosed to be due (R. 26-27).

The Circuit Court of Appeals for the Seventh Circuit modified the judgment so as to include a proviso that the injunction is without prejudice to the petitioner's right to pursue promptly its administrative remedy if it wishes to do so, and affirmed the judgment as thus modified (R. 47-48).

ARGUMENT

The petitioner contends (Br. 17) that Federal Order No. 41 is invalid and should not be enforced by the courts because it does not set forth the price which will give milk a purchasing power equivalent to its purchasing power during the base period, which is commonly referred to as parity price. The petitioner contends that under the terms of the statute the Secretary must not only ascertain the parity price, but must also publish the price in the order and in each amendment thereto. We submit that this issue may not properly be raised in

this proceeding, and that in any event the petitioner's contention is erroneous.

I

This is an action brought under Section 8a(6) of the Act (Appendix, *infra,* p. 14) specifically to enforce the provisions of the milk order and to restrain the petitioner from violating its provisions. Whether the order contains all the findings required by the Act is an issue that may not be raised in this enforcement proceeding because the Act provides an exclusive forum to which a handler must resort to test the validity of the order. Section 8c(15 of the Act (7 U.S.C. 608c(15) provides that any handler subject to an order may file a written petition with the Secretary stating that the order or any provision thereof "is not in accordance with law." The ruling of the Secretary, after a hearing on the petition, is subject to judicial review by the district court to determine whether it is in accordance with law. Section 8c(15) also provides that the pendency of proceedings under that section shall not impede, hinder, or delay the United States from obtaining relief pursuant to Section 8a(6). The latter section, under which this action was commenced, authorizes the district courts to enforce and to restrain any person from violating an order. However, an enforcement proceeding under that section abates whenever a final decree is entered in a Section 8c(15) review pro-

ceeding between the same parties and covering the same subject matter (Sec. 8c(15)).

In *United States* v. *Ruzicka,* 329 U. S. 287, this Court reviewed the purposes of this carefully conceived remedial system and held that Section 8c(15) provides an exclusive remedy for testing the validity of a milk order. The Court said (p. 294):

> It is suggested that Congress did not authorize a district court to enforce an order not "in accordance with law." The short answer to this rather dialectic point is that whether such an order is or is not in accordance with law is not a question that brings its own immediate answer, or even an answer which it is the familiar, everyday business of courts to find. *Congress has provided a special procedure for ascertaining whether such an order is or is not in accordance with law.* The questions are not, or may not be, abstract questions of law. Even when they are formulated in constitutional terms, they are questions of law arising out of, or entwined with, factors that call for understanding of the milk industry. And so Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture. It is on the basis of his ruling, and of the elucidation which he would presumably give to his ruling, that resort may be had to the courts. [Emphasis supplied.]

Petitioner seeks to distinguish *United States* v. *Ruzicka, supra,* and to rely upon *Stark* v. *Wickard,*

321 U. S. 288. It is difficult to find relevance here for the rule of *Stark* v. *Wickard*—that since Congress had provided no administrative remedy for a producer to review the legality of an order, the courts were open to him. As this Court pointed out in *Ruzicka* (329 U. S. at 295), "by § 8c(15) Congress has made precisely such provisions for handlers. As to them the procedural scheme is complete." The petitioner here, a handler, would distinguish *Ruzicka* on the ground that there the action of the Secretary complained of related to the computation of the handler's financial obligations under the order, while here the petitioner is challenging the validity of the order. This attempted distinction flies in the face of Section 8c(15) which expressly makes its appeal and review procedure applicable to contentions that "any such *order* or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law * * *" (emphasis supplied). If reference to the legislative history is justified, we find that the enforcement and review provisions of this Act were described by both the Senate Committee on Agriculture and Forestry and the House Committee on Agriculture as intended to "establish an equitable and expeditious procedure for testing the *validity of orders,* without hampering the Government's power to enforce compliance with their terms" (emphasis sup-

plied).[2] Clearly, Congress intended, as it did, to channel all attacks on the validity of marketing orders through the orderly review procedures afforded by Section 8c(15).

There is a faint suggestion by petitioner that to apply the exclusive review procedure of Section 8c(15) to the issue in this case would be unconstitutional as delegating judicial power to the executive branch of the government. Even regarding the case as presenting only a simple issue of whether the Act requires publication in the marketing order of the Secretary's determination of parity, the suggestion is groundless. As noted above, the Congressional purpose is clear. The power of Congress to channel judicial review of the validity of the marketing order under the statute in a proceeding separate and apart from enforcement proceedings is equally clear. *Case* v. *Bowles,* 327 U. S. 92, 98 (relied upon by petitioner), *Yakus* v. *United States,* 321 U. S. 414, and *Lockerty* v. *Phillips,* 319 U. S. 182, under the Emergency Price Control Act. See, also, *Walling* v. *Cohen,* 140 F. 2d 453 (C. C. A. 3) under the Fair Labor Standards Act, and *Piuma* v. *United States,* 126 F. 2d 601 (C. C. A. 9), certiorari denied, 317 U. S. 637, under the Federal Trade Commission Act as amended.

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[2] S. Rep. No. 1011, p. 14, H. Rep. No. 1241, p. 14, 74th Cong., 1st Sess.

II

Both the district court and the court below considered and rejected petitioner's contention that the order is invalid because it does not set forth the parity price ascertained by the Secretary. If it is assumed that the issue may be raised in this action, we submit that the order contains all findings required by the Act.

Section 8c(18) provides that prior to fixing minimum prices the Secretary shall ascertain the parity price of milk. Computation of parity price, which involves technical and statistical determinations, is thus only a preliminary step in fixing the minimum price to be prescribed in the order. After the parity price has been ascertained, the Secretary must determine, upon the basis of the evidence adduced at a hearing, whether that price is a reasonable price in view of the price of feeds, the available supply of feeds, and other economic conditions that affect market supply and demand for milk in that area. If the Secretary finds that the parity price is not a reasonable one in view of those factors, he must fix a minimum price that reflects those factors.

Federal Order No. 41 contains the following finding:

> That the prices calculated to give milk produced for sale in said marketing area a purchasing power equivalent to the purchasing power of such milk, as determined pursuant to section 2 and 8e of said act, are not reason-

> able in view of the price of feeds, the available supplies of feed, and other economic conditions which affect market supply of and demand for such milk, and that the minimum prices set forth in this order, as amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest.

This finding necessarily reflects the fact that the Secretary ascertained the parity price in accordance with the statutory direction—he could not otherwise have determined that it was unreasonable in view of the factors specified in Section 8c(18). The section does not require the Secretary to publish the parity price in the order after he has ascertained it and rejected it as the basis of the minimum price.[3] Since the Secretary is not required to set forth the factors which caused him to reject the parity price, there would be no reason to require him to publish this price in his order fixing minimum price.

The petitioner contends (Br. 28) that the parity price ascertained in accordance with the provisions of subsection 8c(18) must be set forth in the order because of the requirement of subsection 8c(4), which reads:

> After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an

[3] This is consonant with the administrative interpretation. The finding (3 F.R. 1945, 1957, 2100, 2102) in the New York milk order involved in *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, is the same in this respect as the finding in Order No. 41 which the petitioner is challenging.

> order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of said sections with respect to such commodity.

This subsection provides that when the Secretary issues an order he shall find, and set forth in his order, that its issuance will tend to effectuate the declared policy of Title I of the Act. This is the only finding which is required to be set forth in the order. It is further provided that the Secretary is to make such findings upon the evidence introduced at the hearing on the order and "such other findings as may be specifically required by this section." The quoted language clearly relates to the basis upon which the Secretary is to act in making the finding required by the subsection, not to the contents of the Secretary's order. If Congress had intended the meaning for which the petitioner contends, subsection 8c(4) would have provided substantially as follows:

> After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, upon the evidence introduced at such hearing, that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity, and he shall set forth in such order such finding and

such other findings as may be specifically required by this section.

Petitioner asserts (Pet. 13) that the decision of the court below is probably in conflict with *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, and *Thomas Paper Stock Co.* v. *Porter,* 328 U. S. 50, but petitioner makes no showing of such conflict. The quotations from these cases cited by petitioner (Br. 29-30) deal with the necessity for making findings or for setting them forth in an administrative order under legislation totally different in language and purpose from that here involved.

CONCLUSION

The decision below is correct and there is no conflict of decision. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1948.

APPENDIX

Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601 *et seq.*, re-enacting, with amendments, the Agricultural Adjustment Act of 1933, 48 Stat. 31, as amended:

Sec. 2. It is hereby declared to be the policy of Congress—(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of all agricultural commodities in the base period. * * *

Sec. 8a(6). The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts.

Sec. 8c(1). The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section.

Sec. 8c(4). After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity.

Sec. 8c(15). (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States (including the District Court of the United States for the District of Columbia) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry

of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to 8a(6) of this title. Any proceedings brought pursuant to section 8a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15), shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

Sec. 8c(18). The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain, in accordance with section 2 and section 8e, the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period.

* * * Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 8b or 8c, as the case may be, that the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period as determined pursuant to section 2 and section 8e are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

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